

No. 4:20-cv-03709

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF TEXAS
HOUSTON DIVISION**

STEVEN HOTZE, M.D., WENDELL CHAMPION, HON. STEVE TOTH, AND
SHARON HEMPHILL,

Plaintiffs

v.

CHRIS HOLLINS, in his official capacity as Harris County Clerk,

Defendant

**BRIEF FOR AMICUS CURIAE ON BEHALF OF THE TEXAS
COALITION OF BLACK DEMOCRATS IN SUPPORT OF
DEFENDANT**

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Cases

Reynolds v. Sims, 377 U.S. 533, 554 (1964).....7

Other Authorities

Alexa Ura, In Texas, USPS Woes and State Deadlines Could Leave Voters Without
Enough Time to Return Mail-in Ballots (2020),
<https://www.texastribune.org/2020/08/20/Texas-election-mail-ballots/> (last
visited Oct. 8, 2020).....9

Amy Gardner, ‘My people fought for the right to vote’: With a surge of emotion,
Black Americans rush to the polls,
[https://www.washingtonpost.com/politics/black-voters-2020-
election/2020/10/18/bdc06ad0-0f3b-11eb-8074-0e943a91bf08_story.html](https://www.washingtonpost.com/politics/black-voters-2020-election/2020/10/18/bdc06ad0-0f3b-11eb-8074-0e943a91bf08_story.html)
(last visited Oct. 26, 2020).....11

Erin Cox, Elise Viebeck, Jacob Bogage and Christopher Ingraham, Postal Service
Warns 46 States Their Voters Could be Disenfranchised by Delayed Mail-in
Ballots, [https://www.washingtonpost.com/local/md-politics/usps-states-
delayed-mail-in-ballots/2020/08/14/64bf3c3c-dcc7-11ea-8051d5f887d73381
_story.html?tid=ss_tw](https://www.washingtonpost.com/local/md-politics/usps-states-delayed-mail-in-ballots/2020/08/14/64bf3c3c-dcc7-11ea-8051d5f887d73381_story.html?tid=ss_tw) (last visited Oct. 8, 2020).....8,10

Human Rights Campaign Foundation & Highly Insightful Targeting Strategies, Vote
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Luis Noe-bustamante and Abby Budiman, Most Of The 23 Million Immigrants Eligible To Vote In 2020 Election Live In Just Five States, https://www.pewresearch.org/fact-tank/2020/03/03/most-of-the-23-million-immigrants-eligible-to-vote-in-2020-election-live-in-just-five-states/ (last visited Oct. 8, 2020).....	8
Michelle Alexander, The New Jim Crow 192 (2012).....	5
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STATEMENT OF THE ISSUE PRESENTED

WHETHER ENDING DRIVE THRU VOTING AND REFUSING TO COUNT THE THOUSANDS OF HARRIS COUNTY VOTES CAST AT DRIVE THRU POLLING SITES NEGATIVELY AFFECTS BLACK VOTERS.

INTEREST OF AMICUS CURIAE

The Texas Coalition of Black Democrats submits this brief on behalf of Black voters. As an organization the Texas Coalition of Black Democrats is a political organization that seeks to end poverty, hunger, homelessness, race-based health disparities, the racial wealth-income-and education gap. The Coalition uses politics to address these issues by increasing voter engagement and holding candidates accountable for protecting and enhancing voting rights. The Coalition's mission is to protect and empower Black Democratic voters and the officials we elect as well as advancing an agenda focused on justice, opportunity, equity and economic prosperity. Therefore, the Texas Coalition of Black Democrats writes to inform the Court of the effect of disregarding the hundreds of thousands of votes cast via drive thru voting in Harris County.

SUMMARY OF THE ARGUMENT

Like any other election, the November 2020 election ought to be guided by hearing the voices of the American people. The election will not reflect America's voice if certain voters are pushed out due to a lack of access to the polls. The push to continue to change voting procedures and decrease access to absentee voting uniquely harms Black voters. Non-white voters are more likely than other voters to request absentee ballots. Additionally, Black voters are much more likely to be infected and suffer the most serious effects of COVID-19. Reducing access to absentee voting forces Black voters to decide between exposing themselves to a life-threatening disease or lose their chance to vote.

ARGUMENT

I. THIS ELECTION CYCLE HAS PRESENTED INCREASED CONFUSION AND UNIQUE ACCESS ISSUES FOR VOTERS TO GET TO THE POLLS, UNFAIRLY BURDENING BLACK VOTERS.

In the midst of a contentious election it is vitally important that every American who seeks to vote has the ability to access that right. Access to this right is already significantly limited because of the COVID-19 pandemic. People fear going into public spaces due to the risk that it imposes on their health. Because of this, more voters than ever before have requested absentee ballots. In the midst of so many absentee ballot requests there are rising concerns about the ability of the United States Postal Service (“USPS”) to deliver the votes on time. Governor Abbott has passed two proclamations regarding voting. First, his July proclamation expanded early voting to mitigate public health concerns about crowded polling locations; however, his second proclamation in October limited absentee ballot drop off locations forcing absentee voters in large counties to face significant commutes to drop off their ballot or the uneasiness of submitting a ballot by mail. In light of these changes, Harris county attempted to mitigate these concerns by offering drive thru voting. Drive thru voting allows voters to drive to a polling location and vote from their car.

In light of COVID-19, there is a heightened need for alternative options for Black voters to cast their ballot without having to wait in crowded lines and

physically enter polling locations. Black voters are much more likely than white voters to be infected with COVID-19 and face its more serious effects. In a general election, non-white voters are more likely to request absentee ballots; and with COVID-19 added to the equation it is essential that black voters have safe access to the polls. Due to increasing social unrest it is increasingly important for Black voters to feel that they have adequate access to the polls to voice their concerns about the leadership of this country.

II. AMERICA HAS A PERVASIVE HISTORY OF SUPPRESSING BLACK VOTERS.

America has a long history of politically disenfranchising Black voters. Even after Black Americans were granted the right to vote, they were denied access to the polls through policies such as poll taxes and literacy tests. In the late nineteenth and early twentieth century, Black Americans “were denied the right to vote through poll taxes, literacy tests, grand-father clauses, and felon disenfranchisement laws.”¹ These insidious techniques of pushing Black voters out of the polling booth are continued today. The plaintiffs are attacking drive thru voting in hopes of narrowing the margins for Harris county races. They seek to throw out over one hundred thousand votes from “democrat areas” which are more likely to be frequented by Black voters.

¹ Michelle Alexander, *The New Jim Crow* 192 (2012).

III. THE EVENTS LEADING UP TO THE 2020 ELECTION HAVE CREATED THE PERFECT STORM OF SOCIAL UNREST AND VOTER CONFUSION.

A. Fear of voter intimidation

It is important to acknowledge that this election cycle has been cloaked in social unrest and racial divisiveness, in part due to the murders of Ahmaud Arbery, George Floyd, and Breonna Taylor, who were unarmed Black Americans killed by police. Their tragic murders along with the president's refusal to disavow white supremacists and hate groups make many Black Americans feel unsafe and unprotected by their government. Consequently, Black Americans are voting in record numbers because they believe that their lives and the lives of future generations depend on the outcome of this election, yet sadly, many Black voters feel uncomfortable voting in person given the impact of COVID-19 in communities of color. Reducing access to absentee voting mechanisms forces Black voters to make the impossible choice between protecting themselves from exposure to COVID-19 or waiting in crowded lines to cast their ballot in person.

B. Voter Confusion

This election has been rife with voter confusion. There has already been significant confusion on ways in which individuals seeking to avoid crowds could vote this election. The Governor issued two proclamations changing voting

requirements in October and July. There have been changes to rules on wearing masks at polling locations.² There was confusion as to whether fear of COVID-19 was a qualification for getting an absentee ballot. There have been over two hundred lawsuits nationally³ and approximately thirty lawsuits in Texas.⁴ This is the third lawsuit on this issue alone. Notably, The Supreme Court of Texas denied the realtors' emergency motion for temporary relief on the issue of drive thru voting on October 22, 2020.⁵ Subsequently, on November 1, 2020, The Supreme Court of Texas denied a Petition for Writ of Mandamus which was filed on the issue of drive thru voting.⁶ Thus, The Supreme Court of Texas has declined two opportunities to invalidate drive thru voting.

Voters cannot keep up with the ever-changing voting requirements, and at this point in the election, it is simply too late in the game to change course now. Qualified voters have the right to vote and the right to have that vote counted. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Furthermore, Harris County voters were previously

² Jolie McCollough, Texas voters won't be required to wear masks while voting after appeals court temporarily lets Abbott order stand, <https://www.texastribune.org/2020/10/28/texas-voting-mask-abbott/> (last visited Oct. 30 2020).

³ Eric Tucker, Voting Lawsuits Pile Up Across US as Election Approaches, <https://apnews.com/article/election-2020-virus-outbreak-donald-trump-voting-lawsuits-124eca1b346c2fa64f6add1710031ec4> (last visited Oct. 30 2020).

⁴ Guy-Uriel E. Charles, Texas legal battles highlight how the 2020 election is being fought in the courts, <https://www.nbcnews.com/think/opinion/texas-legal-battles-highlight-how-2020-election-being-fought-courts-ncna1244306> (last visited Oct. 30, 2020).

⁵ Order, The Supreme Court of Texas, October 22, 2020, <https://www.txcourts.gov/media/1449951/supreme-court-of-texas-orders-10-22-2020.pdf> (last visited Nov. 2, 2020).

⁶ Order, The Supreme Court of Texas, November 1, 2020, <https://www.txcourts.gov/media/1449985/supreme-court-of-texas-orders-11-01-2020.pdf> (last visited Nov. 1, 2020).

allowed to utilize drive thru voting during the July 2020 primary run-off election. Regardless of the legality of drive thru voting, Harris county voters have been instructed that it is a legitimate voting method. Relying on these instructions many Harris county voters have cast their ballots at drive thru polling locations and they have a right for those ballots to be counted.

IV. DRIVE THRU VOTING IS ESSENTIAL FOR BLACK VOTERS.

A. Non-white voters rely on absentee voting.

There are over 16 million registered voters in Texas.⁷ Non-white residents make up a large portion of the state. The United States Census Bureau notes that there are over 6 million non-white-only residents, out of almost 29 million total residents, in the state of Texas. The state also has approximately 1.8 million immigrant eligible voters.⁸ A recent survey of non-white voters shows that nearly half of the individuals in their nationwide poll expected to vote by mail.⁹ The majority of Texas's non-white residents live in its largest counties. For example, Harris County is home to over 4.5 million residents, which over 40% of which

⁷ *Turn Out and Voter Registration Numbers*, Texas Secretary of State's Office, <https://www.sos.state.tx.us/elections/historical/70-92.shtml> (last visited Oct. 8, 2020).

⁸ Luis Noe-bustamante and Abby Budiman, *Most Of The 23 Million Immigrants Eligible To Vote In 2020 Election Live In Just Five States*, <https://www.pewresearch.org/fact-tank/2020/03/03/most-of-the-23-million-immigrants-eligible-to-vote-in-2020-election-live-in-just-five-states/> (last visited Oct. 8, 2020).

⁹ Human Rights Campaign Foundation & Highly Insightful Targeting Strategies, *Vote by Mail Among Non-White Voters National Non-White Voters Survey (2020)*, <https://hitsrat.com/wp-content/uploads/2020/08/HRC-Updated-Slides-PUBLIC-FINAL-2.pdf> (last visited Oct. 8, 2020).

identify as Latino and around 20% identify as Black. These voters face the brunt of limited access to voting due to decreased absentee mechanisms.

B. The USPS has experienced significant strain this year and the final date for sending in a mail in ballot has now passed.

The United States Postal Service (“USPS”) has nationally expressed their concerns about delays that could lead to an increased amount of rejected ballots this year.¹⁰ As a result, Harris County anticipated an exponential increase in the number of residents who will hand deliver their mail ballots to ensure they are received timely. Governor Abbott’s October 1 Proclamation¹¹ limited absentee ballot drop off locations, disproportionately impacting large counties in Texas such as Harris county. This change happened after drop-off locations had already been set up in Harris county. Voters who many have originally planned to submit their absentee ballot by mail may have already made arrangements to drop off their ballot in person at a location near their home. When these drop off locations were closed, these voters likely turned to drive thru voting as a way to ensure that their ballot was counted without having to brave crowded polling lines.

¹⁰ Erin Cox, Elise Viebeck, Jacob Bogage and Christopher Ingraham, Postal Service Warns 46 States Their Voters Could be Disenfranchised by Delayed Mail-in Ballots, https://www.washingtonpost.com/local/md-politics/usps-states-delayed-mail-in-ballots/2020/08/14/64bf3c3c-dcc7-11ea-8051-d5f887d73381_story.html?tid=ss_tw (last visited Oct. 8, 2020).

¹¹ The Governor of the State of Texas, Proclamation No. 41-____, Tex. Reg. __, __ (2020)

It is likely too late for voters to mail in ballots in order for them to be counted in the election. According to the Texas Tribune, the number one reason mail-in ballots are not counted is not because of fraud, but because they are late.¹² In the July primary run off, there were 199,218 ballots cast from nine (9) major Texas counties: Harris, Travis, Tarrant, Bexar, Collin, Denton, El Paso, Fort Bend, and Hidalgo.¹³ Of these ballots, 3,010 were not counted.¹⁴ The majority of the rejected ballots, 2,482, were rejected because they were late.¹⁵ Of the ballots rejected due to timeliness, 2,034 were from Harris County alone.¹⁶ This problem will only be worsened with reliance on the United States Postal Service (“USPS”) due to the Governor’s proclamation issued on October 1, 2020.

The USPS has expressed nationally their concerns about delays that could lead to an increased amount of rejected ballots this year.¹⁷ A series of letters were delivered to the states expressing the agency’s concerns about its ability to guarantee timely delivery of absentee ballots.¹⁸ In Houston, specifically, sorting capacity has

¹² Alexa Ura, In Texas, USPS Woes and State Deadlines Could Leave Voters Without Enough Time to Return Mail-in Ballots (2020), <https://www.texastribune.org/2020/08/20/Texas-election-mail-ballots/> (last visited Oct. 8, 2020).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Erin Cox, Elise Viebeck, Jacob Bogage and Christopher Ingraham, Postal Service Warns 46 States Their Voters Could be Disenfranchised by Delayed Mail-in Ballots, https://www.washingtonpost.com/local/md-politics/usps-states-delayed-mail-in-ballots/2020/08/14/64bf3c3c-dcc7-11ea-8051-d5f887d73381_story.html?tid=ss_tw (last visited Oct. 8, 2020).

¹⁸ *Id.*

dropped by 470 thousand pieces of mail per hour, due to sweeping organizational and policy overhaul including the federal cost-cutting policies over the past few months.¹⁹ In 2018, the cumulative of Texas's by-mail voters was 369,598.²⁰ The Harris County Clerk reports that 2020's election could see mail voters increase by seven to eight times that number.

Fearing even more that the USPS would not be able to get their ballot(s) delivered on time, thousands of absentee voters made plans to utilize drive thru polling locations to drop off their ballot. Governor Abbott's October 1 Proclamation burdened those voters even more to drop off their absentee ballot at a drive thru location rather than rely on the USPS. Accordingly, rescinding these votes at such a late date, as requested by the Plaintiffs, will create an enormous burden for absentee voters who have already cast their ballot at a drive thru polling location. If these voters find out, the day before election day, that their vote may not count, they will now face significant lines and exposure to vote in person throughout Harris county on election day. Having thousands of potential voters attempt to recast their ballot on election day puts an enormous strain on voters who trusted government

¹⁹ *Id.*

²⁰ Texas Secretary of State's Office, <https://www.sos.texas.gov/elections/earlyvoting/2016/nov4.shtml> (last visited Oct. 8, 2020).

officials to provide them information on their voting options, effectively disenfranchising them.

C. COVID health concerns

Black communities have been disproportionately impacted by COVID-19. Research shows that “Black Americans are more than twice as likely as Whites to become infected with the novel coronavirus, nearly five times as likely to be hospitalized and twice as likely to die.”²¹ And if Black absentee voters who have historically voted democrat (whether in-person or via absentee ballot) are unable to cast their votes, they are in essence, disenfranchised. Limiting access to absentee voting uniquely harms Black voters because of their traditional reliance on absentee voting and their increased risk of infection if exposed to COVID-19.

IV. CONCLUSION

The combination of a substantial increase in requests for absentee ballots, unprecedented strain on the USPS, and limited access to in person drop off of absentee ballots makes the risk of rejected ballots higher than the risk of voter fraud. Refusing to count the votes already cast by Harris county voters is a bigger harm to society than the much more limited risk of some kind of voter fraud. Ending drive thru voting and refusing to count the votes already cast thus impedes the Texas

²¹ Amy Gardner, ‘My people fought for the right to vote’: With a surge of emotion, Black Americans rush to the polls, https://www.washingtonpost.com/politics/black-voters-2020-election/2020/10/18/bdc06ad0-0f3b-11eb-8074-0e943a91bf08_story.html (last visited Oct. 26, 2020).

Coalition of Black Democrats “[t]o protect and empower Black Democratic voters and the officials we elect as well as advancing an agenda focused on justice, opportunity, equity and economic prosperity.”²² *Amicus Curiae* respectfully submits that this Court uphold drive thru voting in Texas.

Dated this 1st day of November, 2020.

Respectfully submitted,

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²² <https://www.texasblackdemocrats.com/about> (last visited Oct. 26, 2020)

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing via e-service on November 2, 2020 in accordance with the Federal Rules of Civil Procedure.

/s/ Carvana Cloud

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is within compliance with Federal Rule of Procedure 32(g)(1). This brief contains 2,453 words.

/s/ Carvana Cloud